89-803

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

KATHERINE E. HEAD

Petitioner, Defendant

v.

ROY T. HEAD

Respondent, Plaintiff

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS LUCAS COUNTY

WILLIAM P. HICKEY
1970 CR 32
Helena, Ohio 43435
(419) 457-5525

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

Did the Ohio Supreme Court and the Ohio Court of Appeals err in holding that the allegations of lack of due process of law under the U.S. Constitution were "misplaced" in a Domestic Relations case?

Did the Ohio Domestic Relations Court's adoption of an oral contract dealing with real property, given by third parties and never signed by the parties, avoid the Statute of Frauds?

Did the Ohio Domestic Relations Court err by not complying with the mandates in Ohio Revised Code 3105.18 for the reason that its adoption of the oral unsigned agreement as it's own, removed the matter from R.C. 3105.18?

Did the lower court deprive Defendant of her Fourteenth Amendment rights by not following a trial procedure

which automatically would have brought to light the evidence that existed and which was latter supplied by affidavits?

Did all three Ohio Courts commit error in ignoring affidavit evidence dealing with auxiliary matters, and which were pertinent to the motion for a new trial?

Does due process of law under the U.S. Constitution require a court to consider affidavit evidence showing malpractice on the part of an attorney who had been dismissed by the defendant? The malpractice among other things includes: using trickery to continue with the case after his dismissal; presenting an oral agreement to the court after his dismissal which was contrary to what defendant had requested; never telling the defendant that she was going to a trial or final hearing on the action; never explaining what

her legal rights were, or the procedure she could expect; and never telling her that his withdrawing of the answer and leaving the court room would allow a divorce to be granted which she did not want.

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IN THE

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No.

KATHERINE E. HEAD

PETITIONER

v.

ROY T. HEAD

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO COURT OF APPEALS
LUCAS COUNTY

The Petitioner, Katherine E. Head respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for Lucas County, Ohio entered on April 14, 1989.

OPINIONS BELOW

The opinion of the Ohio Supreme Court entered August 23, 1989; the opinion of the Ohio Court of Appeals entered April 14, 1989; and the opinion of the Domestic Relations Court for Lucas County, Ohio are set out in the Appendix hereto. All decisions are unreported.

JURISDICTION

This action draws into question what the Fourteenth Amendment rights of a defendant in a civil action are; and whether or not the lower court's action in denying defendant's motion for a new trial violated those rights.

The lower court's violation of defendant's due process of law was not clearly established until the court disregarded the affidavit evidence which swore to the wrong doing complained of. Defendant's assignment of error to the Ohio Court of Appeals clearly charged

that defendant's rights under due process of law had been violated. On April 14, 1989, the Ohio Court of Appeals held against the defendant ruling that defendant's "constitutionally - based argument" was "misplaced". Defendant's assignment of error to the Ohio Supreme Court clearly charged that defendant's rights under due process of law had been violated. On August 23, 1989, the Ohio Supreme Court held that "no substantial constitutional question exists".

The jurisdiction of the U. S. Supreme Court to review this decision of the Ohio Supreme Court is conferred by 28 U.S.C. Section 1257 (3). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: Indiana ex rel. 303 U.S. 95, 58 S. Ct. 443, 82 L.Ed 2d 306; Orr v. Orr 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws."

STATUTES INVOLVED

Ohio Revised Code 3105.18(B)

(See Appendix - A)

STATEMENT OF THE CASE

1.) Background

The defendant-appellant dismissed attorney Jacobs at an early stage of the Domestic Relations case; but the attorney did not remove himself from the case. Instead, he used trickery in getting the presence of defendant at court so he could continue with the case. He told defendant-appellant that the court wanted him to do things, and wanted to see her and him on one occasion, and he got her to go to the final hearing without telling her it was to be the final hearing. She had wanted to bring witnesses and have testimony brought out at such a final hearing. Mr. Jacobs did not tell her that the divorce was to be granted at this hearing. (See Appendix B, infra, motion for new trial & Affidavits A & B)

The occasion for dismissal of Mr.

Jacobs arose because of his handling of a probate case which was further advanced than the Domestic Relations case here. In the probate case, the Executrix had an incapacitating stroke one week after her appointment, but the substitute executrix was never consulted. Instead the attorney for the executrix had his wife perform the Executrix's duties, and the Executrix's husband worked with the attorney's wife to collect the Executrix's fee. Defendant-appellant hired attorney Jacobs to contest the handling of the state. Instead, Mr. Jacobs collaborated with the Executrix's attorney and did nothing to get the appointment changed. As a matter of fact, he never told defendant-appellant of the final hearing and accounting; and so, defendant-appellant fired Mr. Jacobs from both cases.

In the case at bar, defendant-

appellant had always stated to Mr. Jacobs that she wanted the 70 year old husband to have a life estate with title to the home to remain in her name.

As previously stated, trickery was used to get defendant-appellant to accompany Mr. Jacobs to the court for what turned out to be the final hearing of the Domestic Relations case. He had defendant-appellant take a seat in the hall outside of the court room and left her. He came back latter with hand written notes and told her that he had a settlement here in which her husband would pay her $130 per month - the amount he was getting for renting rooms to a son. Then he said if he moved out, she could buy his share. That was the first she had ever heard about not retaining ownership of the home. Mr. Jacobs took her into the court room. She was totally upset, she did not know what her rights

were, and she was in awe of the judge and court room (It was the first time she had been in a court room as a litigant). She wasn't about to interrupt the judge or get in a dispute with him. To her, what the judge said was it.

2.) The Proceedings in Domestic Relations Court

Once in the court room Mr. Jacobs stood up and read from his hand written notes. The judge asked defendant if she understood. She said yes. The judge asked if she thought it was fair. Not knowing what part the judge had played in the dscision she said: yes, I guess so; but she was too distraught to be answering such questions at this time. She was intimidated by the court proceedings, and had never been prepared for what took place. After the judge's questions, the plaintiff's attorney then went over to the hard of hearing plaintiff

and stated in a laud voice what he was to get including the right to force a sale of the house. Now the defendant knew, for the first time, that something was radically different than she had told her attorney she wanted. Mr. Jacobs had on all previous occasions assured her it was her house. The judge set a further hearing for March 4, 1988. The next day defendant went to see attorney Rust whom she had previously hired to represent her in the probate case; and he told her to tell Mr. Jacobs not to prepare and file a journal entry, which she did. Instead, Mr. Jacobs prepared the journal entry and gave it to the judge on March 2, 1988. The judge called off the hearing for March 4, 1988 and journalized the entry.

Attorney Rust filed a motion for a new trial on March 16, 1988 accompanied by Affidavits A & B. The Domestic

Relations Court denied the motion saying that: "Both parties affirmed the settlement read into the record..." "The basic premise upon which the defendant seeks a new trial has nothing to do with the terms of the settlement."

3.) The Court of Appeals Decision

Appellant's assignment of error included:

III. THE COURT DID NOT EXPLAIN TO THE PARTIES WHAT THEIR RIGHTS WERE UNDER THE LAW, AND WHAT THE CONSEQUENCES WERE OF DEFENDANT SAYING SHE UNDERSTOOD (NOTE, DID NOT SAY AGREE) WHAT THE LAWYERS SAID IN COURT ABOUT AN AGREEMENT WORKED OUT BETWEEN THE LAWYERS IN HER ABSENCE.

IV. THE COURT DID NOT ORDER A NEW HEARING WHEN IT FOUND OUT THAT AN ATTORNEY PURPORTEDLY REPRESENTING THE DEFENDANT HAD FRAUDULENTLY WITHHELD THE INFORMATION THAT HE HAD BEEN ASKED TO REMOVE HIMSELF FROM THE CASE.

V. THE COURT DID NOT ORDER A NEW HEARING WHEN IT FOUND OUT THAT THE AGREEMENT BEING SUBMITTED WAS THE WORK OF AN ATTORNEY WHICH THE DEFENDANT HAD DISMISSED.

The court ends its poorly reasoned decision with the following statements:

> "we find no evidence of fraud upon the court."
>
> "A large amount of appellant's discussion is devoted to a personal evaluation of trial counsel's conduct. However, the record fails to support appellant's accusations."
>
> "The court of appeals in an appeal upon questions of law cannot consider in reaching judgment facts drawn from the personal knowledge of counsel where such facts are not a part of the record." Allison v. Watkins (1957) 78 Ohio Law Abs. 60.

The above shows how poorly reasoned the decision is. In Allison v. Watkins which the appeals court relies on, the court there clearly states that the only facts before it occurred in counsel's arguments, and if there had been evidence in the form of affidavits, their decision would probably be different.

In the case at bar, appellant's facts are totally supported by affidavits.

4.) The Ohio Supreme Court Decision

The Ohio Supreme Court's reasoning is no better than is the Ohio Court of Appeals'. It is a one sentence decision which states: "no substantial constitutional question exists."

This is the status of "due process of law" in civil cases in Ohio.

REASONS FOR GRANTING THE WRIT

It is clear from the history in this case, that if anything is to be done to secure "due Process of law" in civil cases to citizens of the United States, it will not come from the court system in Ohio, and must come from the Supreme Court of the United States.

If in our legal system a defendant is to be charged with ultimate responsibility of defense, common sense would require, that the court first determine that the defendant has been properly prepared to assume such

responsibility. Due process of law should require that no court use the words of a defendant as controlling the court's decision until certain safeguards are established by the court to assure that the court is in fact justified in using the words of a defendant as controlling.

The Supreme Court of the United States has clearly dictated that such must be done in criminal cases. The facts in the present case make it clear that such needs to be done in civil cases.

CONCLUSION

The facts in this case clearly show:

1. The status of "due process of law" in civil cases in Ohio and most other state court systems.

2. That if anything is to be done to correct the situation, it will have to be done by the Supreme Court of the United States.

3. The status of due process in Ohio is such as to end up with lopsided, unjust court decisions as exemplified by the balance sheet of the court's agreement given in Appendix - G.

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

William P. Hickey

William P. Hickey

Attorney for Petitioner
1970 CR 32
Helena, Ohio 43435
(419) 457-5525

Certificate of Service

I certify that I am a member of the Bar of this Court representing the Petitioner herein and that three copies of the above petition for writ of certiorari to the Ohio Appeals Court were served upon counsel for the respondents, by U.S. mail, first class postage prepaid, addressed to Richard C. Garand, 2300 Navarre Ave., Oregon, Ohio 43616, this 18th day of November, 1989.

William P. Hickey

A-1

IN THE

SUPREME COURT OF THE UNITED STATES

No.

KATHERINE E. HEAD

PETITIONER

v.

ROY T. HEAD

RESPONDENT

APPENDIX

(Appendix - A)

Ohio R. C. 3105.18

(A) In divorce, dissolution of marriage, or alimony proceedings, the court of common pleas my allow alimony it considers reasonable to either party.

The alimony may be allowed in real or personal property, or both, or by decreeing a sum of money, payable either in gross or by installments, as the court considers equitable.

(B) In determining whether alimony is necessary, and in determining the nature, amount, and manner of payment of alimony, the court shall consider all relevant factors, including, but not limited to, the following:

(1) The relative earning abilities of the parties;

(2) The ages, and the physical and emotional conditions of the parties;

(3) The retirement benefits of the parties;

(4) The expectancies and inheritances of the parties;

(5) The duration of the marriage;

(6) The extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home;

(7) The standard of living of the parties established during the mariage;

(8) The relative extent of education of the parties;

(9) The relative assets and liabilities of the parties;

(10) The property brought to the marriage by either party;

(11) The contribution of a spouse as homemaker.

IN THE COMMON PLEAS COURT OF LUCAS COUNTY,
OHIO DOMESTIC RELATIONS DIVISION

Roy T. Head 5432 305th Street Toledo, Ohio 43611 D.O.B. 12/03/17 SS #299-09-7515 Plaintiff,	Case No. DR 87-1779 Judge Robert Dorrell DEFENDANT'S MOTION FOR NEW TRIAL; ORAL HEARING THEREON REQUESTED
vs.	
Katherine Head 1970 Road 32 Helena, Ohio 43435 D.O.B. 12/04/21 SS # 273-14-6029 Defendant.	John G. Rust 833 Security Building Toledo, Ohio 43604 (419) 243-9191

Now comes Defendant Katherine E. Head, through her Attorney, and does respectfully move the Court for an order vacating, setting aside, and holding for naught the divorce decree, heretofore filed on March 2, 1988; and also for a New Trial, and in support states;

1. Through mistake, inadvertence, surprise, or excusable neglect, there was a failure on the part of both parties,

and of both counsel, to understand, and to be informed of, under the heat, pressure, and the emotional atmosphere, of the negotiations on the day, believed to be February 4, 1988, when this case was assigned for trial, and the parties, according to the Plaintiff, entered into some kind of agreement. Neither counsel was aware that Mr. Head and Mrs. Head had separated along in July, 1986, and at that time, they implicitly and tacitly, and in a practical manner, agreed, that the deed, which has been given by Mr. Head, and the transfer to Mrs. Head of Mr. Head's interest, in the house and premises, at 5432 305th Street, Toledo, Ohio, was to be upheld and affirmed that Mr. Head was to have the right to live in the house, together with their son David and his wife Debbie; Mr. Head was to pay for insurance, taxes, and also, to maintain the said house; but there

was no agreement, that Mr. Head was to have any half interest, or any other kind of an interest in the property in question, being the house, at 5432 305th Street, Toldeo, Ohio; but, we repeat, neither counsel was aware of this understanding and agreement; nor did anyone on February on February 4, 1988, and/or the day of the hearing herein, explain to the Defendant, why, the aforesaid agreement was not binding and effective, and why the Court would not go along with such an understanding;

2. For additional items of mistake, inadvertence, surprise, or excusable neglect, or accident, as provided in Rule 59 Sub-Section (3), Defendant states and represents to the Court, that on the day of this hearing, that she was highly emotional, that she cried, that she cried even during the time that the parties were in the Court room, and that

was the first time, that she had heard the word "equity"; and that she had been told beforehand, by her then counsel, that she was entitled to have the deed given to her, and the deed had been promised by the attorney and the company representing the seller, and that she had paid off the final payments to the Sawicki reality interest; so that actually, she did not understand the legal implications, and had not been in a position that day to understand, nor to defend herself;

3. Further, the mistake, accident, and surprise, are further evidenced and manifested by the fact, that since July, 1986, she has had many items of household goods and furnishings, of her own, which she had left in the house in question, including without excluding others; cocktail table, and chairs, a bedroom set, kitchen chairs, various lamps,

christmas trimmings which had been given to defendant by her grandmother, and were like heirlooms; boxes, or nick-nakes, which had been placed on the cornice boards; dishes, silver-ware, drapes, linens, cooking utensils, washer and dryer; there has never been any agreement, nor understanding, that these items were transferred to Mr. Roy Head; and the parties had agreed that whenever she wanted to, she could take her personal items, her personal households goods and furnishings;

4. That there are other items of accifrny, surprise, which ordinary prudence could not have quarded against, and other items of mistake, inadvertence, or excusable neglect; that the plaintiff, has a pension income of Social Security of approximately of over $600.00, and the defendant Social security is $271.00; that defendant Mrs. Head works about

25 hours per week, at $5.44 per hour so that her net take home pay, is around a $100.00 a week; that Mr. Head, is supposed to receive from his son David and wife Debbie, the sum of $130.00 per month which David and Debbie receive from the Lucas County Welfare Department, for their rent money. That Mrs. Head has no real assurance of how long she will be able to work; and that the real and clearly demonstrable needs of Mr. Head, and of Mrs. Head, are much greater than the needs of their children; that this Court, and any and every other Court considering the matter, should first secure to Mr. Head, and Mrs. Head, an ability to support themselves, and that need, takes precedence, over the natural desires of either Mr. Head, or Mrs. Head, to cause any inheritance to be given to any of the children, which each deems deserving; and all of this creates, and

will create, a hardship, upon either party, and this should be the primary consideration and concern which any Court has upon these two parties, but these concerns, were not communicated to the Court nor to the parties, nor did they try to work them out;

5. Defendant repeats, that upon the final day of the so called hearing, that Mrs. Head did not understand that as a final trial;

6. The judgment of divorce is not sustained by the weight of the evidence; and the judgment is contrary to law and equity; and these matters were planned and intended to be brought to the attention of the Court on the designated date and time of hearing of March 4, 1988, at 9:00 am; and this counsel, inquired of the Court as to the exact time, and was advised then that the Court had already signed and filed the judgment

entry, which in fact and in truth was filed on March 2, 1988; and the understanding and statements not only of the Defendant Mrs. Head, and then Debbie Head, wife of David Head, and Joyce Head, who had been present at the Court, on February 23, 1988, each have stated, to Mrs. Katherine Head, that they also understood that everybody was to come back on the morning of March 4, 1988.

7. And further, it is simply asking to much of any human being, like Mrs. Head, for the attorney to advise her, that she was going to get the deed, that the property was hers, and that she could rely on that, and then to come on the day of the so called Divorce Hearing, and then for the first time tell her then, that the Court would divide the house, and give a part of the interest in the house in question, to Mr. Roy

Head, and a part, to Mrs. Katherine Head; realistically, no one can expect, a lady, in her precarious financial and emotional state, to understand, all of the ramifications, legal complications, and effects of this settlement; and again, Defendant Mrs. Katherine Head did not understand the word "equity";

8. And behind, all of this problem is the fact, the children of the parties hereto, John Head, Roy Head Jr., are trying to so position matters, that each could inherit, or get money from Mr. Roy Head, in the event of any sale of the property; further, Mr. Roy Head worked for the Sawicki Realty Company, and son Roy Head took his place at Sawicki, and also the son John Head, had hired attorney Garand;

9. And further, this defendant refers to other affidavits that are attached hereto and made a part hereof.

Wherefore, Defendant Moves for a New Trial, and relief under Rule 60 B; and for Oral Hearing hereon. Defendant depends upon each specification, separately, and collectively.

Respectfully submitted,

Sgn John G. Rust

State of Ohio;
County of Lucas; SS

Katherine E. Head, being first duly sworn, depose and states that she has read the foregoing Motion for New Trial, and that the statements of fact therein contain, as relate to her, are true, to the best of her recollection.

Sgn Katherine E. Head

Swore to before me and subscribed in my presence of this 16th day of March,

1988.

Sgn John G. Rust

State of Ohio;

County of Lucas; SS

John G. Rust being first duly sworn, deposes and states that the statements in the foregoing Motion for New Trial, as they relate to him, are true.

Sgn John G. Rust

Sworn to before me and subscribed in my presence of this 16th day of March 1988.

Sgn Colleen A. Anaszewicz

COLLEEN A. ANASZEWICZ

Notary Public,

State of Ohio

STATE OF OHIO)

COUNTY OF LUCAS)SS

COURT OF COMMON PLEAS

DIVISION OF DOMESTIC RELATIONS

ROY T. HEAD

Plaintiff Case No. DR87-1779

AFFIDAVIT

KATHERINE E. HEAD EXHIBIT - A

Defendant

Katherine E. Head being first duly sworn, says that:

1. After a prolonged period of my husband seeing other women, I had attorney Max Britz file for divorce, custody and support for minor children, equitable relief, and an injunction, on or about May 2, 1962, as records in this court show. (Permission is requested to obtain copies of these papers from the court and attach them hereto at a late date).

2. Roy Thomas Head was served with

these papers on May 5, 1962. A copy of the summons handed Roy on that date is attached hereto.

3. Approximately two months later, I received a letter stating that I must appear before a court councelor concerning provisions for the children, and that if I did not appear, it could be used against me. Roy received a similar notice. I went, but Roy did not attend.

4. A month or so later, I reeived a letter from Attorney Britz asking me what I intended to do concerning a the divorce. I read the letter and left it available for Roy to see.

5. Approximately 3 weeks thereafter, Roy, at about 1 or 2 o'clock in the afternon, told me that I could have the house and everything in it, and that he would put it in writing, if I dropped the divorce action.

6. At that time I fealt that this

was giving me the protection I needed to renew a relationship with Roy, and was in the best interest for the children and myself.

7. Immediately thereafter a paper was written stating something to the affect that: "I Roy Head do give to Katherine Head the house and everything in it." Roy signed the paper, and a few days later, I gave it to my mother for safe keeping.

8. I fealt at that time that this was a binding agreement and that the house was mine, and that is why I gave it to my mother for safe keeping and did not keep it in the home.

9. I did not press Roy to do anything further at that time because it; didn't occur to me that anything else was necessary.

10. Sometime in early 1975, Roy said he was having the property put in

my name to protect the property from bill collectors. He said if it was in my name nobody could come in and take it.

11. On or about the 21st day of February 1975, Roy brought a Supplemental Agreement to me for signing, which I signed.

12. Shortly thereafter Roy brought home a copy of the original Land Contract, the Supplemental Agreement I had signed, and an Assignment dated February 21, 1975, a copy of all of which is attached hereto.

13. After Roy brought the above described papers home, I put the papers on the top shelf in the office closet with the deeds to other properties that had been bought in the past. I took care of the office in the home, and the shelf is where I put important papers for long term safe keeping.

/s/ Katherine E. Head

Sworn to before me and subscribed in my present this 16th day of March, 1988.

/s/ John L. Rust

Notary public, State of Ohio

(Appendix - D)

STATE OF OHIO)

COUNTY OF LUCAS) SS.

COURT OF COMMON PLEAS

DIVISION OF DOMESTIC RELATIONS

ROY T. HEAD

Plaintiff Case No. DR87-1779

vs. AFFIDAVIT

KATHERINE E. HEAD EXHIBIT-B

Defendant.

Katherine E. Head being first duly sworn, says that:

1. In March of 1985, my son David got married and he brought his wife Debbie and her daughter into my home. Roy did nothing about it.

2. On July 9, 1985, Debbie left David and David began drinking and became violent. At about midnight I left the house. Roy still did nothing about the matter and I remained out of the house.

3. On Nov. 22, 1986, Roy was taken to Parkview Hospital.

4. On Nov. 24, 1986, I called my son David and his wife Debbie answered the phone. I said: "Debbie I'm coming home to take care of Roy." Debbie said: "Girl you left him, this is no longer your house", and she hung up the phone. I called back and said I wanted to talk to David and she hung up again.

5. On Nov. 25, 1986, I went to see Roy in Parkview Hospital and met my granddaughter Linda who was also staying in my house. I told Linda that Debbie had hung up on me, but before she did, Debbie said she paid the gas bill. Linda said: "Welfare paid the gas bill".

6. In a subsequent conversation with Roy in the hospital Roy said he neded glasses. In Oct. 1986 I had given him $85 for glasses. In the past there had been a practice of asking me for money and then not using it for the

purpose for which I gave them the money.

7. In December I was told by son David that my sons Junior and John had ordered david, Debbbie and Linda out of the house, saying they were going to sell the property.

8. In the early part of January 1987 I went to see Attorney Jacobs concerning the matter. I showed Mr. Jacobs the Land Contract which put title solely in my name. I told Mr. Jacobs this had been given to me as a settlement from Roy in response to a Divorce action I had Max Britz file on May 5, 1962. Roy gave me a paper to that effect, and I gave the paper to my Mother for safe keeping. She now has passed away, and I can't locate the paper. Attorney Jacobs said: "They can't sell the house, it's in your name. It's your house."

9. In the later part of January 1987, I called to check on Roy and David

told me that Junior and John again ordered David, Linda and debbie out of the house and that they changed the locks on the two outside doors of the house. David said they gave him a key and that it was good that he tried it before leaving the house because the key did not work.

In the same conversation David asked if I would have Attorney Jacobs send a letter having them move so that welfare would give them; money to rent another place. I went to Attorney Jacobs and he said: "It's your house, you can take the cops and go in". Attorney Jacobs prepared the letters and sent the letters to David and Linda.

10. Sometime during the summer of 1987, John and Junior went to an attorney who filed a divorce action. I saw Attorney Jacobs again and he said: "Don't worry Katherine, I'm protecting your rights, and it's your house".

11. In the fall of 1987, Attorney Jacobs had been handling my interests in my Mother's estate. I was dissatisfied because he let the Final Account hearing go by without telling me and without doing anything about the fact that my sister Nora had a stroke one week after her appointment. The Will said my sister Violet should be substitute Executrix. I then hired another attorney to represent me in the Estate.

12. On December 22, 1987, I saw Attorney Jacobs and told him I had another attorney to represent me also in the divorce action and that I wanted my papers back and a refund. He refused to comply and still has not given my back my papers.

13. In early January 1988, Attorney Jacobs told me a hearing was coming up in January between Garand and himnself and that I didn't have to be there. I saw Attorney Jacobs a few days later

and he asked me to come into his office. He said he had told Garand that he thought I was being very reasonable giving Roy a life estate as long as he wanted to stay in the house, and that I hadn't taken anything away from Roy.

14. In late January 1988, Attorney Jacobs informed me that the court had set another hearing (did not say triasl) for February 4, 1988.

15. I went to the court on Feb. 4,1988 and met Attorney Jacobs. He told me to take a seat in the hall, but before we sat down I told him I had paid off the contract on the house. After we sat down together he said he was looking out for my god and my property. He said Garand knew of the $1400 I had received from my Mother's Estate. I said, what $1400. $450 went to you, $445 paid off the house, and $314 went for taxes on the house. He then said he ;had contacted

Toledo Trust and they agreed to make Roy solely responsible for the car. He said Roy would have to pay me $130 per month as long as he lived in the house. He said Roy would be responsible for taxes and insurance on the house. Then he excused himself and left to see Attorney Garand. When he came back he went over the same things again except that he said that if Roy moved out of the house, I could buy Roy's share of the house. This was the first time I ever heard anything about buying out Roy's share, or that I didn't own the whole house. He then asked if I understood. I think I said yes, whereupon he left. I thought there would be a trial to determine ownership, and that I could give the facts to the court.

16. Then we went into the courtroom. Jacobs and I sat at one table, Roy, Garand and Debbie sat across the room. I was

upset and confused. Attorney Jacobs began reading what appeared to be terms of an agreement. What I was hearing was not what I wanted in an agreement or what I was left to believe I could expect in an agreement. The terms were not to my best interest. I wanted to tell the court about the whole situation. I started by telling about the damage that had been done to the property. I began to cry. The Judge, began to talk. When he stopped talking I was too emotionally upset to continue to bring out all of the other facts which I fealt would be considered by the court. I fealt totally betrayed.

17. On that evening, I left Attorney Jacobs a note saying: "I'm not buying that deal".

18. On February 10th I talked to David on the phone and he said that Dad had got papers to sign from Attorney

Jacobs. That night I left a note for Jacobs saying: "You are no longer my attorney, You lied to me. Get off my case."

20. On February 11th I called attorney Jacobs to get my cas number. He said: "Katherine, I got the Deed to your house, do youwant me to record it?" I said, no I'll record it myself. That evening I saw Jacobs in the hall of the Spitzer Bldg. where I work. He said: "Hello Kathy". I said I want my Deed. He said, don't you want me to record it? I said No, I can do it myself. He said he would have to explain something to me. I saw him later that evening when he was leaving for home. I said, I want my Deed. He said come in at 4:30 Monday. I had an appointment with Attorney Rust at 4:30 Monday. I left a note on February 12th saying I'd hate to have to take this up with the Bar Association.

If I don't get my Deed and papers, you leave me no other alternative. I had gone to Sawicki Realty myself and paid off the Land Contract telling them I'd be back for the Deed, and I didn't tell Jacobs to get the Deed.

21. On February 18th I left another note for Jacobs telling him I had another Attorney to represent me.

22. On February 19th he left me an envelope with my name on it with a letter inside saying there was to be a hearing on February 23th. The next day I received the same letter in the mail.

23. On February 22th I saw Attorney Jacobs in the hall. He said Judge Dorrell wanted him to come to court. I said all right. I called my Attorney Rust and asked him to be there.

24. On February 23, 1988, I got to court about 8:10 A.M. Shortly

thereafter Attorney Jacobs came down the corridor and said: "Hello Katherine". He went into Judge Dorrell's courtroom. At 8:40 he came out and said: "Katherine, Judge Dorrell will see you now". I said: "I'm waiting for my attorney. At 8:45, Attorney Rust and I went into the court room. Judge Dorrell recessed the case until March 4, 198.

25. Attorney Rust got a copy of the proposed Journal Entry. At this time the legal significance of the term "equity" as opposed to "life estate" was explained to me. I had always told Attorney Jacobs that I was willing for Roy to have a life estate, but now I find that the word equity was substituted, and that this change would give Roy title to ½ of the property. In the mean time, since the property is in my name, I am responsible for all payments that Roy choses not to make. His Social security

is $600 per month, and mine is $265. In addition he gets to keep $130 per month with no guarantee that he will ever make any payments. I also find that "personal property" means all my possessions and furniture that are in the house. I am going on 67 years of age, and the house is practically all I have to take care of me for the rest of my life. According to the proposed Journal e try, I would have to pay Roy's bills out of my $265 if I am to preserve the asset. I find all this out after Mr. Rust gave me a copy of the proposed Journal Entry.

sign Kathryn E Head

Sworn to before me and subscribed in my presence this 16th day of March, 1988.

sign John G. Rust

Notary public,
State of Ohio

(Appendix - E)

COURT OF APPEALS OF OHIO SIXTH DISTRICT COUNTY OF LUCAS

C. A. NO. L-88-201

Roy T. Head	APPEAL FROM
APPELLEE	LUCAS COUNTY COMMON PLEAS COURT DOMESTIC
-VS-	RELATIONS DIVISION
Katherine E. Head	NO. DR 87-1779
APPELLANT	DECISION AND JOURNAL ENTRY

DATE April 14, 1989

This matter is before the court on appeal from a judgment of the Lucas County Court of Common Pleas, Domestic Relations Division.

Defendant-appellant, Katherine E. Head, and plaintiff-appellee, Roy T. Head, were married September 16, 1945. Appellee filed for divorce November 16, 1987 seeking, inter alia, an equitable division of assets. Appellant answered the complaint November 26, 1987, requesting that the complaint for divorce be denied and the matter dismissed.

A hearing was held February 4, 1988, in the Lucas County Court of Common Pleas, Domestic Relations Division. At this time, on the basis of appellee's testimony and testimony of the parties' daughter-in-law, the court determined that the parties had been living separate and apart for longer than one year.

It was also on this date, in open court, that the settlement agreement was read into the record by appellant's trial counsel. A second hearing was held February 23, 1988. Appellant was present at the hearing represented by both trial and appellate counsel. At this hearing, appellant expressed her dissatisfaction with the settlement agreement.

The settlement agreement provided for a distribution of assets. Appellant was to transfer title to a 1982 Pontiac automobile to appellee and appellee was

to pay any outstanding debt due on the car. Second, title to the marital home, located at 5432 305th Street, Toledo, Ohio, was to remain in appellant's name. Appellee was granted the right to "remain in possession of the property so long as he chooses" and was held to have one-half equity in the property "upon its sale, transfer or upon his death." Appellee's equity in the property was to be diminished by $130 per month and by any amount he failed to pay on the car. Appellant was granted the right to inspect the premises at any "reasonable time" and appellee was ordered to pay all expenses related to the property. The agreement further stated that if appellee moved out and appellant rented the premises, appellee was entitled to one-half of the net proceeds. The agreement set forth the procedure to be followed in the event of a sale of

the premises. Finally, it was stated that each party was to "receive all of the personal property, household goods and possessions presently in their possession ***."

In a judgment entry dated March 2, 1988, the trial court found that appellant had withdrawn her answer and found that the parties had been living separate and apart for a period in excess of one year. Appellee was granted a divorce upon this ground. The court signed the above-mentioned agreement adopting that settlement as its own entry.

Appellant filed a motion for new trial March 17, 1988, seeking to set aside the March 2, 1988 judgment entry. The trial court denied appellant's motion for new trial in a decision and order dated June 2, 1988. It is from this judgment that appellant appeals, setting forth the following six assignments of

error:

"I. THE COURT AT ITS FINAL HEARING DID NOT INQUIRE INTO EACH OF THE RELEVANT FACTORS WHICH RC 3105.18 (B) STATES SHALL BE CONSIDERED, AND NO TESTIMONY WAS TAKEN CONCERNING SAME.

"II. THE COURT ERRED IN SPLITTING THE PROPERTY EQUALLY WHICH IS OSTENSIBLY THE CASE.

"III. THE COURT DID NOT EXPLAIN TO THE PARTIES WHAT THEIR RIGHTS WERE UNDER THE LAW, AND WHAT THE CONSEQUENCES WERE OF DEFENDANT SAYING SHE UNDERSTOOD (NOTE, DID NOT SAY AGREE) WHAT THE LAWYERS SAID IN COURT ABOUT AN AGREEMENT WORKED OUT BETWEEN THE LAWYERS IN HER ABSENCE.

"IV. THE COURT DID NOT ORDER A NEW HEARING WHEN IT FOUND OUT THAT AN ATTORNEY PROPORTEDLY [sic[REPRESENTING THE DEFENDANT HAD FRAUDULENTLY WITHHELD THE INFORMATION THAT HE HAD BEEN ASKED TO REMOVE HIMSELF FROM THE CASE.

"V. THE COURT DID NOT ORDER A NEW HEARING WHEN IT FOUND OUT THAT THE AGREEMENT BEING SUBMITTED WAS THE WORK OF AN ATTORNEY WHICH THE DEFENDANT HAD DISMISSED.

"VI. THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR IN DENYING DEFENDANTS-APPELLANT'S [sic[MOTION FOR A NEW TRIAL AND ALL WITHOUT A HEARING THEREON."

Appellant's first three assignments of error are directly concerned with the settlement agreement, i.e. the division of property, and, therefore, will be considered simultaneously. In her first assignment of error, appellant asserts that the trial court failed to consider the statutory property distribution factors set forth in R.C. 3105.18(B). Appellant's second assignment of error suggests that it was error for the trial court to equally distribute the parties' property. The third assignment of error is focused upon the procedural aspects of ratifying the settlement agreement. Appellant asserts that at the time the settlement was read in open court, she was unaware of the consequences of telling the court she understood the agreement. In other words, appellant argues that she did not expressly "agree" with the settlement

and, therefore, it is invalid and should be overturned.

As a reviewing court, our analysis of this case is clearly limited to what is contained in the record. App. R. 9(A). The record indicates that a settlement agreement was drafted by the parties and read in open court by appellant's attorney. Immediately after the recitation, the following dialogue occurred:

> "[APPELLANT'S COUNSEL]: Right. Now, Mrs. Head, you heard the arrangement that we recited?
>
> "MRS. HEAD: Yes.
>
> "[APPELLANT'S COUNSEL]: Do you understand that arrangement?
>
> "MRS. HEAD: Yes.
>
> "[APPELLANT'S COUNSEL]: Do you feel that arrangement is fair to you?
>
> "MRS. HEAD: Yes, I guess so.
>
> "[APPELLANT'S COUNSEL]: Do you have any questions about it?

> "MRS. HEAD: Well, no, but [I am concerned about] the damage to the house that's been done *** by [my son David and his wife, Debbie]."

Subsequently, an on-the -record discussion occurred between appellant, her counsel and appellee's counsel. As a result, a provision was added to the agreement stating that appellant could inspect the property "at any reasonable time" and that the property was not to be "damaged or abused other than normal wear and tear ***."

The court asked appellant specifically if she understood what was being discussed in regard to the conditions of the house. Appellant responded affirmatively. The record also shows that when appellant's counsel asked her if she was "satisfied" with her representation appellant responded: "Yes."

At this point, appellee's counsel

detailed the terms of the agreement to appellee. When asked if he was satisfied with the agreement, appellee answered: "I am."

Appellant's first assignment of error is that the court failed to consider the relevant factors set forth in R.C. 3105.18(B). Our research discloses no authority that requires a court entering a judgment which incorporates the terms of an "in-court" settlement to consider the factors set out in R.C. 3105.18(B). See Thomas v. Thomas (1982), 5 Ohio App. 3d 94, 100. Further, R.C. 3105.18 dictates:

> "*** the procedures to be followed by the trial courts in contested proceedings and is not applicable to uncontested proceedings where the parties have stipulated an 'in-court' settlement." Thomas, supra, at 100.

Appellant contends that the court's equal distribution of the parties' assets was inappropriate. The record indicates

that the settlement was discussed in open court and that the court adopted the agreement regarding property distribution. The only property settlement in this case is the agreement acknowledged in open court by appellant and which was adopted by the court and incorporated into its order.

In her third assignment of error, appellant appears to be contending that she was deprived of her property without "due process of law." We find appellant's constitutionally-based argument to be misplaced.

The record indicates that appellant was given an opportunity, in open court, to object to the settlement. In fact, she expresed dissatisfaction with some of the terms and the agreement was amended to reflect her concerns. Appellant stated that she was satisfied with her trial counsel and acknowledged

that she understood the terms of the settlement. Contrary to appellant's belief, neither appellant's trial counsel nor the trial court entered a "no contest" plea on her behalf by utilizing a settlement agreement reached between the parties.

Appellant's twist of criminal and domestic legal terminology is clearly inappropriate. As a whole, appellant's constitutional argument fails to further the assertion that she did not "agree with the terms of the settlement. Accordingly, we find nothing improper or inequitable in the division of marital assets or in the trial court's adoption of the parties' settlement agreement.

For the aforestated reasons, we find appellant's first, second and third assignments of error not well-taken.

In assignments of error four, five and six, appellant essentially contends

that it was error for the trial court to deny her motion for a new tiral. Appellant asserts that the trial court knew that her trial counsel fraudulently withheld the information that he had been fired and that the settlement agreement was presented to the court after she told her attorney not to submit it.

Paraphasing her motion to the trial court, we find that appellant asserted that a new trial should be granted on the following grounds:

> "(3) Accident or surprise which ordinary prudence could not have guarded against;
>
> "***
>
> "(6) The judgment is not sustained by the weight of the evidence ***." See Civ. R. 59(A).

In its decision and order denying appellant's motion for new trial, the trial court state, inter alia:

> "The basic premise upon which the Defendant seeks a new trial has nothing to do with the terms of the settlement. ***
>
> "*** There is no way that the Defendant will ever be deprived of her interest in this property as claimed by her in her memorandum in support of her motion for new trial."

Essentially, after an evaluation of appellant's motion, supporting memoranda and affidavits, the trial court determined appellant had failed to set forth evidence establishing grounds for a new trial. We agree.

In evaluating appellant's arguments, we are compelled to note, once again, that the property settlement was negotiated in open court. Appellant had sufficient opportunity to voice her objections. Further, the record contains evidence of the parties' financial conditions; accordingly, we find that with ordinary prudence appellant could have guarded against any "surprise."

Further, we find no evidence of fraud upon the court. If appellant had terminated association with trial counsel, the record fails to indicate that the trial court was informed of the dismissal prior to the February 23, 1988 hearing. Additionally, appellant's trial and appellate counsel were both permitted to speak on her behalf at the February 23 hearing.

A large amount of appellant's discussion is devoted to a personal evaluation of trial counsel's conduct. However, the record fails to support appellant's accusations.

> "The court of appeals in an appeal upon questions of law cannot consider in reaching judgment facts drawn from the personal knowledge of counsel where such facts are not a part of the record." Allison v. Watkins (1957), 78 Ohio Law Abs. 60.

Accordingly, we are unable to find merit in appellant's contention that a new trial should have been granted. For the aforestated reasons, we find appellant's fourth, fifth and sixth assignments of error not well-taken.

Upon consideration whereof, this court finds substantial justice has been done the party complaining, and the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed. Appellant is ordered to pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See, also, Supp. R. 4, amended 1/1/80.

John J. Connors, Jr, J.

George M. Glasser, J.

Charles D. Abood, J.
CONCUR.

THE SUPREME COURT OF OHIO

1989 TERM

Roy T. Head	:	To wit: August 23, 1989
	:	
Appellee	:	Case No. 89-1002
	:	
v.	:	
	:	
Katherine E. Head	:	ENTRY
Appellant.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Lucas County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by William Hickey.

(Court of Appeals No. L88201)

Thomas J. Moyer

THOMAS J. MOYER
Chief Justice

(Appendix - G)

BALANCE SHEET

of

COURT ADOPTED AGREEMENT

Roy T. Head (70 ears old)	Katherine E. Head (67 Years old)
ASSETS	ASSETS
½ Equity in house	½ Equity in house
Possession of house	
All furnishings	
Automobile	
$130 Rental Income per month	
$600/mo. Soc. Sec.	$271/mo. Soc. Sec.
LIABILITIES	LIABILITIES
$130 per month, taxes, insurance, auto payments, to come from his ½ equity.	Taxes, insurance, automobile payment if not made by husband.